

IN THE UTAH COURT OF APPEALS

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High Valley Water Company,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20050233-CA
v.	)	
	)	
Silver Creek Investors,	)	F I L E D
	)	(March 9, 2006)
	)	
Defendant and Appellant.	)	<span style="border: 1px solid black; padding: 2px;">2006 UT App 90</span>

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Third District, Silver Summit Department, 010500204  
The Honorable Deno Himonas

Attorneys: Edwin C. Barnes, Steven E. Clyde, and Wendy B. Crowther, Salt Lake City, for Appellant  
David C. Wright, Salt Lake City, for Appellee

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Before Judges Greenwood, Davis, and McHugh.

DAVIS, Judge:

Defendant Silver Creek Investors (Silver Creek) appeals the trial court's entry of final judgment in favor of Plaintiff High Valley Water Company (High Valley). We affirm.

This appeal arises out of an action for declaratory judgment filed by High Valley. The trial court ruled that an option (the Option) allowing Silver Creek to purchase certain water rights from High Valley was no longer enforceable "by virtue of the statute of limitations," even though Silver Creek had properly exercised the Option and High Valley had breached the Option by failing to perform. Silver Creek timely appealed, arguing that the trial court erred in determining that the Option was no longer enforceable due to the statute of limitations.<sup>1</sup>

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<sup>1</sup>Neither of the parties appeals the trial court's ruling that Silver Creek properly exercised the Option and that High Valley breached the Option by failing to perform. Therefore, the only issue on appeal is whether the Option is unenforceable due to the statute of limitations.

The applicability of a statute of limitations is a legal question, which we review for correctness. See Spears v. Warr, 2002 UT 24, ¶32, 44 P.3d 742. However, the applicability of the statute of limitations "also involves a subsidiary factual determination--the point at which a person reasonably should know that he or she has suffered a legal injury. This is a question of fact," which we review for clear error. Id. To establish that questions of fact are clearly erroneous, "an appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence." Chen v. Stewart, 2004 UT 82, ¶19, 100 P.3d 1177 (quotations, alteration, and citation omitted). "If the evidence is inadequately marshaled, this court assumes that all findings are adequately supported by the evidence." Id.

"Once a claim accrues, it may not be maintained unless it is commenced within the limitations period prescribed by the applicable statute of limitations." DOIT, Inc. v. Touche, Ross & Co., 926 P.2d 835, 843 (Utah 1996). In a breach of contract action, a claim accrues and the statute of limitations is triggered when the breach occurs. See Butcher v. Gilroy, 744 P.2d 311, 313 (Utah Ct. App. 1987). A breach occurs when one party repudiates or refuses to perform under a contract. See Cobabe v. Stanger, 844 P.2d 298, 303 (Utah 1992) ("A party's refusal to perform under the terms of the agreement constitutes a breach of that agreement."); Madsen v. Murrey & Sons Co., 743 P.2d 1212, 1217 (Utah 1987) ("As a result of buyer's repudiation, buyer breached the agreement."); cf. Scott v. Majors, 1999 UT App 139, ¶15, 980 P.2d 214 (holding that a statement that a party will not perform unless the other party modifies a contract is a repudiation "'because the breach that he threatens . . . is a complete refusal of performance'" (alteration in original) (citation omitted)).

Here, in 1993 and 1994, High Valley clearly refused to perform under the contract despite its obligation to do so. Indeed, the trial court made specific findings that in 1993 and 1994 Silver Creek demanded that High Valley perform its obligations under the Option, which High Valley refused to do.<sup>2</sup> These refusals to perform constituted repudiations or breaches that triggered the statute of limitations. Silver Creek therefore had an obligation to commence an action within six

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<sup>2</sup>Silver Creek has not challenged any of the trial court's findings of fact or attempted to marshal the evidence in support of these findings. As such, we assume that these findings are adequately supported by the record. See Chen v. Stewart, 2004 UT 82, ¶19, 100 P.3d 1177.

years of High Valley's repudiation. See Utah Code Ann. § 78-12-23 (2002) (setting statute of limitations for breach of written contract claims at six years).<sup>3</sup> Because Silver Creek failed to do so, the trial court did not err when it determined that, "by virtue of the statute of limitations, [the Option] is no longer enforceable."

Silver Creek argues that the Option remains an executory contract and, therefore, the statute of limitations has not yet begun to run. But a contract is executory when it "remains wholly unperformed" or "there remains something still to be done on both sides." Black's Law Dictionary 321 (7th ed. 1999). In the alternative, Silver Creek argues that High Valley did not breach the Option until at least 1999 because Silver Creek did not treat High Valley's 1993 and 1994 refusals to perform as breaches, but instead "continued to expect performance from High Valley until at least 1999." However, the cases that Silver Creek cites to support the proposition that a performing party can treat a repudiation as an immediate breach, or can continue to treat the contract as operable and urge performance without waiving any right to sue, pertain to anticipatory breaches only. See, e.g., Kasco Servs. Corp. v. Benson, 831 P.2d 86, 89 (Utah 1992) ("An anticipatory breach occurs when a party to an executory contract manifests a positive and unequivocal intent not to render performance when the time fixed for performance is due."); Upland Indus. Corp. v. Pacific Gamble Robinson Co., 684 P.2d 638, 643 (Utah 1984) ("An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance . . . ." (quotations and citation omitted)); Breuer-Harrison, Inc. v. Combe, 799 P.2d 716, 725 (Utah Ct. App. 1990) ("The basis for the modern rule [allowing a performing party to continue to treat the contract as operable despite an anticipatory breach] is to give the breaching party the opportunity to cure the breach before the time for performance is due.").

Here, the trial court ruled that "Silver Creek's conduct in providing timely and proper written notice of exercise of the Option and the timely deposit of funds . . . constituted full performance of its obligations under the Option," which "gave rise to High Valley's obligation to file the permanent change application to segregate the [fifty-six] acre feet and otherwise begin the process of transferring the [fifty-six] acre feet to Silver Creek." The parties do not contest this ruling. Thus, Silver Creek's performance was complete and High Valley's

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<sup>3</sup>The statute of limitations for breach of written contract has been six years for all time periods relevant to this appeal. We cite to the 2002 version of the statute for ease of reference.

performance was due beginning on or about December 31, 1987, and thereafter, during which time it clearly and unequivocally repudiated the contract. It follows that the Option does not constitute an executory contract and that High Valley's repudiation of its obligations under the Option did not constitute an anticipatory breach, but instead constituted a breach that commenced the running of the statute of limitations.

Affirmed.

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James Z. Davis, Judge

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WE CONCUR:

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Pamela T. Greenwood,  
Associate Presiding Judge

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Carolyn B. McHugh, Judge